

Office of the State Appellate Defender
Illinois Criminal Law Digest

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TABLE OF CONTENTS

<u>APPEAL</u>	1
<u>BURGLARY & RESIDENTIAL BURGLARY</u>	2
<u>COLLATERAL REMEDIES</u>	2
<u>CONFESSIONS</u>	8
<u>COUNSEL</u>	12
<u>DISCOVERY</u>	22
<u>EVIDENCE</u>	23
<u>GUILTY PLEAS</u>	26
<u>JURY</u>	28
<u>JUVENILE</u>	28
<u>ROBBERY</u>	31
<u>SEARCH AND SEIZURE</u>	33
<u>SENTENCING</u>	37
<u>STATUTES</u>	42
<u>WAIVER - PLAIN ERROR - HARMLESS ERROR</u>	42
<u>WITNESSES</u>	44

TABLE OF AUTHORITIES

United States Supreme Court

Luis v. United States.....	12
----------------------------	----

Illinois Supreme Court

People v. Bradford.....	2
People v. Burns.	34
People v. Clark.....	31, 42
People v. Timmsen.....	36

Illinois Appellate Court

Mitchell v. People.	9, 42
People v. Abram.....	24, 33
People v. Adams.....	14
People v. Allen.	10
People v. Armstrong.	19, 27
People v. Carter.....	35
People v. Chacon.....	6
People v. Christian.	10
People v. Gray.	22, 26
People v. Gregory.	25
People v. Higgins.....	18, 28
People v. Holman.....	28, 37
People v. Jackson.	14
People v. Jones.....	4

People v. Meeks.	20
People v. Mitchell.	16
People v. Mourning.	21
People v. Nelson.	2, 40
People v. Nieto.	7, 30, 38
People v. Salem.	44, 46
People v. Smith (1-14-0887 & 1-14-0937).	3, 41
People v. Smith (4-14-0085).	5
People v. Tayborn.	8, 19
People v. Veach.	1, 17
People v. Weinke.	23, 44

APPEAL

§2-6(a)

People v. Veach, 2016 IL App (4th) 130888 (No. 4-13-0888, 3/11/16)

1. Where a reviewing court must consider matters outside the record in order to decide whether trial counsel provided ineffective assistance, the issue is more appropriately addressed in post-conviction proceedings. To help clarify which cases raising ineffectiveness may be appropriately addressed on direct appeal, the Appellate Court suggested dividing such cases into three categories.

Category A: cases that the court should decline to address. These are cases where the appellate record is not adequate to determine whether counsel was ineffective. The record will typically be missing information about the communication between counsel and defendant and about counsel's trial strategy and tactics.

When faced with this type of case, the reviewing court should decline to address the issue, affirm the lower court's judgment, and indicate that defendant may raise the issue in a post-conviction petition.

Category B: cases that the court may address because they are clearly groundless. On rare occasions, the claim clearly has no merit and thus there is no need to examine the information that is typically missing from the direct appeal record.

Category C: cases that the court may address because trial counsel's errors were so egregious that the reviewing court can determine that trial counsel was ineffective without seeing further evidence. In such cases, the court must be able to conclude that no justifiable explanation for counsel's error could possibly exist.

2. Here, trial counsel agreed that video recordings should be admitted even though they contained prior consistent statements and bad character evidence. The court held that even though "at first blush" it was not clear why trial counsel agreed to admit this evidence, this was a Category A case that should not be addressed on direct appeal. The record contained no information about why counsel agreed to admit the evidence and since this was not a case where no justifiable explanation for counsel's action could possibly exist, the court would need to improperly guess at counsel's motivation to resolve the issue.

The court thus declined to address defendant's claim, affirmed his convictions, and noted that defendant may raise his claim in a post-conviction petition.

3. The dissent believed that the record on appeal showed ineffective assistance of counsel and that delaying the claim until a post-conviction proceeding was improper.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

BURGLARY & RESIDENTIAL BURGLARY

§8-1(c)

People v. Bradford, 2016 IL 118674 (No. 118674, 3/24/16)

Burglary may be committed in two ways: (1) by entering a building without authority with the intent to commit a felony or theft, or (2) by remaining within a building without authority with the intent to commit a felony or theft. 720 ILCS 5/19-1(a).

Here defendant was charged with the second type of burglary, remaining within a building without authority. Defendant entered a retail store during regular business hours and at all times stayed in areas of the store that were open to the public. Once inside the store, defendant stole several items. The trial court convicted defendant of burglary and sentenced him to three years imprisonment.

The Supreme Court reversed defendant's conviction. A defendant commits burglary by remaining within only where he exceeds his physical authority to be on the premises by: (1) hiding and waiting for the building to close; (2) entering unauthorized areas within the building; or (3) remaining on the premises after his authority is explicitly revoked. By contrast, a defendant who enters a building lawfully, shoplifts items in areas that are open to the public, then leaves during business hours, is only guilty of ordinary retail theft.

Here defendant never entered areas which were off-limits to the public, remained in the store after it closed, or in any other manner exceeded the scope of his physical authority as a member of the public to be in the store. The State thus failed to prove defendant guilty of burglary.

(Defendant was represented by Assistant Defender Joel Wessol, Springfield.)

COLLATERAL REMEDIES

§9-1(c)

People v. Nelson, 2016 IL App (4th) 140168 (No. 4-14-0168, 3/10/16)

Defendant argued for the first time on appeal from the second-stage dismissal of his post-conviction petition that he did not receive the correct pre-sentence credit against his sentence. The State did not challenge defendant's claim that he was entitled to more credit, but argued that sentence credit is a statutory claim that cannot be raised in a post-conviction petition.

The court agreed that defendant was entitled to the additional credit, but held that it did not have authority to award defendant the credit. The Post-Conviction Hearing

Act is jurisdictional in nature limiting the subject matter reviewable under the act to claims of a substantial denial of constitutional rights. 725 ILCS 5/122-1. The denial of a statutory right is not cognizable under the act.

Although the Illinois Supreme Court held that a sentence with incorrect sentence credit is void and may be attacked at any time, **People v. Roberson**, 212 Ill. 2d 430 (2004), that holding no longer correctly reflects the law after **People v. Castleberry**, 2015 IL 116916, abolished the void judgment rule.

Since the court had no jurisdiction over defendant's statutory claim, it could not grant him the relief he requested. The court noted however that defendant could petition the trial court to correct the "simple error in arithmetic, as trial courts retain jurisdiction to correct non-substantial matters of inadvertence or mistake."

(Defendant was represented by Assistant Defender Joel Wessol, Springfield.)

§§9-1(i)(1), 9-5(d)

People v. Smith, 2016 IL App (1st) 140887 (Nos. 1-14-0887 & 1-14-0937 (cons), 3/1/16)

1. The post-conviction hearing act typically contemplates the filing of only one petition. The court may normally only allow a defendant to file a successive petition if he demonstrates cause and prejudice. 725 ILCS 5/122-1. But under the void-sentence rule, a sentence which is not authorized by statute is void and may be subject to collateral attack at any time.

2. In a successive post-conviction petition, defendant argued his extended-term sentences were unauthorized by statute and hence void. The trial court denied leave to file the successive petition. On appeal, defendant argued that the trial court improperly dismissed his successive petition since his sentences were void and subject to attack at any time.

After defendant filed his opening brief, the Supreme Court decided **People v. Castleberry**, 2015 IL 116916, abolishing the void-sentence rule. Defendant argued in his reply that since **Castleberry** created a new rule, it should not apply retroactively to cases on collateral review, and thus the void-sentence rule should apply to his case, allowing him to challenge his sentence in a successive petition.

3. Under **Teague v. Lane**, 486 U.S. 288 (1989), a judicial decision that establishes a new rule applies to all criminal cases pending on direct review, but does not apply (with two exceptions inapplicable here) to cases on collateral review. A decision creates a new rule if the result was not dictated by precedent existing at the time defendant's conviction became final.

The Appellate Court held that **Castleberry** did not create a new rule. Instead it abolished an old rule and thereby reinstated the rule that existed before the void-sentence rule was established by **People v. Arna**, 168 Ill. 2d 107 (1995).

Since **Castleberry** “did not announce a new rule and cannot be applied retroactively,” defendant could properly challenge his sentences in a successive post-conviction petition. The court vacated the extended-term portion of defendant’s sentences.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

§9-1(j)(2)

People v. Jones, 2016 IL App (3d) 140094 (No. 3-14-0094, 3/16/16)

Defendant filed a post-conviction petition which alleged that at his trial for first degree murder, the trial court erred by admitting a redacted version of a videotape of interviews between police and defendant and by restricting the defense from playing the entire videotape. The petition also alleged that the trial court denied a fair trial by allowing the State to introduce the decedent’s autopsy photographs.

After 90 days passed, the petition was advanced to the second stage. Counsel was appointed and filed an amended petition alleging that appellate counsel had been ineffective for failing to challenge the trial court’s evidentiary rulings concerning the autopsy photographs and allowing a redacted version of the defendant’s statements to go to the jury. The amended petition did not mention the un-redacted version of the videotape.

At the second-stage hearing, appointed counsel explained that the ineffective assistance of counsel arguments concerned appellate rather than trial counsel. Counsel argued that the issues had been preserved by trial counsel but not raised on direct appeal.

The Appellate Court found that appointed post-conviction counsel failed to provide a reasonable level of assistance.

1. Appointed counsel is required to render a reasonable level of assistance to a post-conviction petitioner. Under Illinois Supreme Court Rule 651(c), post-conviction counsel must consult with the petitioner to ascertain contentions of constitutional deprivation, examine the record of the proceeding of the original trial, and make any amendments to the *pro se* petition necessary to adequately present the petitioner’s constitutional contentions. Where appointed counsel files a Rule 651(c) certificate, he or she is presumed to have provided reasonable assistance. However, the record may rebut this presumption.

2. Here, the record rebutted the presumption that appointed counsel provided reasonable assistance in amending the *pro se* petition as necessary to adequately present defendant's contentions.

Appointed counsel is not required to amend the *pro se* petition if the petitioner's claims are adequately presented, and is required to investigate and present only those claims which the petition raises. However, Rule 651(c) requires that counsel shape the petitioner's claims into proper legal form and present those claims to the post-conviction court.

The substance of the *pro se* petition's claim was that defendant wanted the jury to see the entire videotape rather than the redacted version introduced by the State. Because trial counsel argued extensively that the omitted statements were necessary to the defense, but failed to present any additional video footage including the purported exculpatory statements which had been omitted from the State's redacted version, the Appellate Court concluded that the *pro se* allegations were sufficient to inform post-conviction counsel that defendant wanted to challenge not only the trial court's evidentiary ruling but also trial counsel's ineffectiveness.

Although counsel appointed in post-conviction proceedings need not comb the record to discern claims which the *pro se* petition did not raise, the petition here identified the specific evidence in question and explicitly argued that the State's redacted evidence failed to show the entire line of questioning or purported exculpatory statements. Defendant also included citations to the record to support his claim. Under these circumstances, the record clearly revealed to appointed counsel that trial counsel failed to present statements which he extensively argued were necessary to the defense.

3. Remand is required where post-conviction counsel fails to fulfill the duties of Rule 651(c), including consulting the petitioner, examining the record, and amending the *pro se* petition. The matter was remanded for the appointment of new counsel.

(Defendant was represented by Assistant Defender Chris McCoy, Elgin.)

§9-1(j)(2)

People v. Smith, 2016 IL App (4th) 140085 (No. 4-14-0085, 3/8/16)

Under Rule 651(c), the record must show that counsel consulted with defendant to ascertain his contentions of constitutional error, examined the record of the trial proceedings, and made any amendments to the petition necessary to adequately present defendant's contentions. Ill. S. Ct. Rule 651(c).

Post-conviction counsel may withdraw from representing a defendant under **People v. Greer**, 212 Ill. 2d 192 (2004) only after counsel has complied with Rule 651(c).

A certificate filed pursuant to Rule 651(c) creates a presumption that counsel has complied with the rule. In the absence of such a certificate, the record must contain “a clear and affirmative showing of compliance.”

Here counsel filed a motion to withdraw from representing defendant on his post-conviction petition. The trial court allowed the motion to withdraw and granted the State’s motion to dismiss the petition. Counsel filed no 651(c) certificate.

The Appellate Court held that the record failed to show that counsel complied with Rule 651(c). Although the record showed that counsel consulted with defendant, it failed to show that counsel consulted with defendant to ascertain his constitutional claims. The court remanded the case for further proceedings.

(Defendant was represented by Supervisor Janieen Tarrance, Springfield.)

§9-1(n)

People v. Chacon, 2016 IL App (1st) 141221 (No. 1-14-1221, 3/1/16)

735 ILCS 5/22-105(a) provides that the trial court may assess fees against a prisoner who files certain *pro se* pleadings which are frivolous. Under the statute, a filing is frivolous if it lacks an arguable basis in law or fact or is presented for an improper purpose such as harassment or to cause unnecessary delay or needless increases in the cost of litigation.

The Appellate Court concluded that defendant’s pleading was not frivolous where at the time he filed a motion challenging his sentence, precedent supported an argument that an MSR term which was not ordered by the trial court could not be added to the sentence by DOC. Although the Illinois Supreme Court subsequently held that the argument lacked merit, an argument that was supported by case law when the motion was filed is not frivolous.

Furthermore, there was no reason to believe that defendant’s filing was intended to hinder, delay, or cause an increase in the cause of cost of litigation. The court noted that defendant had filed no other pleadings in the 17 years since his direct appeal.

The order requiring defendant to pay fees was vacated.

(Defendant was represented by Assistant Defender David Berger, Chicago.)

§9-1(o)(3)

People v. Nieto, 2016 IL App (1st) 121604 (No. 1-12-1604, 3/23/16)

1. Under the Post-Conviction Hearing Act, any claim not raised in the original or amended post-conviction petition is waived. This rule is more than a suggestion and reviewing courts generally may not overlook forfeiture caused by defendant's failure to raise the issue in his petition.

2. A jury convicted defendant, who was 17 years old at the time of the offense, of first degree murder and aggravated battery with a firearm, and additionally found that defendant personally discharged a firearm which proximately caused death, making the minimum sentence 51 years imprisonment. The court sentenced defendant to 78 years imprisonment. In imposing sentence, the court stated that it had considered defendant's "young age" and the fact that everyone can change their lives.

The Appellate Court affirmed defendant's conviction and sentence on direct appeal, specifically holding that his sentence was not excessive. Defendant filed a post-conviction petition raising several claims, but did not argue that his sentence was unconstitutional. After the trial court dismissed his petition at the first stage, the United States Supreme Court held in **Miller v. Alabama**, 567 U.S. ____ (2012) that the Eighth Amendment prohibited mandatory sentences of life imprisonment for juveniles.

On appeal from the denial of his post-conviction petition, defendant argued for the first time that his sentence was unconstitutional under **Miller**. Defendant conceded that he did not raise this issue in his petition, but argued that an as-applied constitutional challenge to a sentence can be raised for the first time on appeal.

3. The Appellate Court examined several cases that followed **Miller** and determined that it could reach defendant's claim. In **People v. Davis**, 2014 IL 115595, the Illinois Supreme Court held that the sentencing statute mandating life sentences was not facially unconstitutional since it could be validly applied to adults. In **People v. Thompson**, 2015 IL 118151, the court held that a judgment based on facially unconstitutional statute is void and may be attacked at any time. The same was not true for an as-applied challenge.

But **Thompson** also discussed **People v. Luciano**, 2013 IL App (2d) 110792, which held that an as-applied sentencing challenge by a juvenile could be raised at any time. The Supreme Court did not expressly find that **Luciano** was incorrect in its forfeiture holding, but instead distinguished it on the merits since the defendant in **Thompson** was not a juvenile. The Appellate Court thus concluded that "considered as a whole, **Thompson** implies that courts must overlook forfeiture and review juveniles' as-applied Eighth Amendment challenges under **Miller**."

Additionally, in **Montgomery v. Louisiana**, 577 U.S. ____ (2016), the United States Supreme Court held that **Miller** announced a substantive rule that barred life sentences for all but the rarest of juvenile defendants, and courts lack authority to leave in place

a sentence which violates a substantive rule. **Thompson** and **Montgomery** thus suggest that forfeiture cannot apply to juvenile defendants raising **Miller** claims.

4. The court addressed defendant's claim and held that the 78-year sentence was unconstitutional as applied to defendant. Although relief following a first-stage dismissal typically involves remand for second-stage proceedings, the proper relief for this claim was to vacate defendant's sentence and remand for resentencing.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

CONFESSIONS

§§10-3(c), 10-3(d)

People v. Tayborn, 2016 IL App (3d) 130594 (No. 3-13-0594, 3/7/16)

1. Statements obtained as a result of custodial interrogation are subject to suppression if the suspect was not given **Miranda** warnings. An "interrogation" is any practice which is reasonably likely to evoke an incriminating response. "Custodial interrogation" occurs where police initiate questioning of a person who has been taken into custody or deprived of his freedom of movement in any significant way.

In determining whether a person is in custody for **Miranda** purposes, the court must determine whether a reasonable person who is innocent of any crime would have felt that he or she was not at liberty to terminate the interrogation and leave. Relevant factors include the time and place of the incident, the number of police officers present, the presence or absence of family or friends, the indicia of a formal arrest, and the manner by which the individual arrived at the place of interrogation.

Due to the non-coercive nature of ordinary traffic stops, a person who is temporarily detained pursuant to an ordinary traffic stop is generally not considered to be in custody for **Miranda** purposes. However, the safeguards prescribed by **Miranda** become applicable during a traffic stop if the suspect's freedom of action is curtailed to the same degree as would occur in a formal arrest. Thus, a temporary detention during an ordinary traffic stop can evolve into a custodial situation requiring **Miranda** warnings before any interrogation.

2. The court concluded that defense counsel was ineffective for failing to move to suppress a statement which defendant made to police. In the course of its holding, the court found that the statement was the result of custodial questioning at the scene of a traffic stop.

Defendant was a passenger in a car that was stopped for not having a license plate light. The driver of the car was arrested because she was acting in a "nervous" and

“furtive” manner. Because an inventory search was to be conducted, defendant was asked to stand outside the car. There was inconsistent testimony concerning whether defendant was handcuffed, but he was not arrested.

When the officers found suspected cocaine in the car, one of the officers questioned defendant about the substance. Defendant responded that he was transporting the cocaine from Chicago to Iowa. Two or three squad cars were present, and four to six officers were at the scene.

The court noted that the trial judge found the defendant was in custody when the cocaine was discovered. The Appellate Court concluded that in any event, defendant’s detention was transformed into custody once the cocaine was found and placed on the hood of the car. Because defendant was in custody, **Miranda** warnings were required before questioning.

Defendant’s conviction was reversed and the cause was remanded for further proceedings.

§10-5(a)

Mitchell v. People, 2016 IL App (1st) 141109 (Nos. 1-14-1109 & 1-15-0816, cons., 3/31/16)

The Torture Inquiry and Relief Commission Act (720 ILCS 40) established a commission to investigate claims of torture. A “claim of torture” is a defendant’s claim that he was tortured into confessing to a crime and “there is some credible evidence related to allegations of torture by Commander Jon Burge or any officer under the supervision of Jon Burge.” 720 ILCS 40/5(1).

Although Burge had been fired by the time the defendants were interrogated, the court held that their cases fell within the jurisdiction of the Act since they alleged that they were tortured by officers who had previously served under Burge’s supervision. The court found that the language of the Act was ambiguous and susceptible of two reasonable interpretations. On the one hand, the phrase “related to allegations” of torture by Burge or those he supervised could be interpreted to include claims of torture by officers formerly under his command. On the other hand, the phrase “under the supervision of” could be interpreted as only encompassing claims of torture by Burge or officers presently under his command at the time the torture took place.

When faced with an ambiguous statute, courts will give substantial weight and deference to the interpretations of the agency charged with administering the statute, even though courts are not bound by such interpretations. Here the committee issued an order concerning its jurisdiction and proposed regulations specifically finding that

its jurisdiction included allegations of torture by officers who were previously supervised by Burge.

The court deferred to the committee's clear interpretation of its jurisdiction and reversed the trial court ruling that the claims fell outside the Act's jurisdiction. The cases were remanded for further proceedings in accordance with the Act.

§10-5(a)

People v. Allen, 2016 IL App (1st) 142125 (No. 1-14-2125, 3/25/16)

The Illinois Torture Inquiry and Relief Commission Act provides relief to defendants who allege that their convictions resulted from physically coerced confessions and who provide some credible evidence that torture was committed by Commander Jon Burge or any officer under his supervision. 775 ILCS 40/5(1). If the commission finds sufficient evidence of torture it transmits its conclusions to the Cook County circuit court. 775 ILCS 40/50.

Defendant applied for relief under the act and the commission determined that there was sufficient evidence of torture to merit judicial review for appropriate relief. But nothing in the commission's findings linked Burge or his subordinates to defendant's confession. The commission sent its conclusions to the circuit court where the State filed a motion to dismiss arguing that the act did not apply because there was no link to Burge or his subordinates. The circuit court agreed and granted the State's motion.

The Appellate Court affirmed the dismissal. The court held that the act is specifically limited to claims of torture by Burge or his subordinates. Since the commission's referral did not show that defendant's confession was factually linked to Burge or his subordinates, the referral was not permitted under the act and was properly dismissed.

§10-5(a)

People v. Christian, 2016 IL App (1st) 140030 (No. 1-14-0030, 3/4/16)

1. The Torture Inquiry and Relief Commission Act (720 ILCS 40) established "an extraordinary procedure to investigate and determine factual claims of torture." A "claim of torture" is a defendant's claim that: he was tortured into confessing to a crime; the confession was used to obtain a felony conviction; and there is some credible evidence relating to allegations of torture by Commander Jon Burge or any officer under his supervision.

The Act established a commission to review torture claims and conduct a formal inquiry into such claims. If at the end of the formal inquiry a majority of the commission members concludes by a preponderance of the evidence that there is sufficient evidence of torture to merit judicial review, the case is referred to the Cook County Circuit Court for a hearing on the claim. The court may then grant such relief as is “necessary and proper.”

2. a. Prior to trial, defendant filed a motion to suppress his 1989 confession alleging that it was obtained through physical coercion when one of the officers at Area 2 hit defendant. The officers and the assistant State’s Attorney who took defendant’s confession testified that no one physically coerced defendant. Defendant did not testify. The trial court denied the motion and defendant’s confession was used at trial.

b. Defendant eventually filed a claim of torture with the commission alleging that he was “struck extremely hard in the face” and ordered to give a false confession to the ASA. The commission conducted a formal inquiry and decided that there was sufficient evidence of torture to merit judicial review.

The commission based its decision on the substantial amount of information uncovered about misconduct at Area 2 since the time of defendant’s trial. The commission also found that there were major inconsistencies between defendant’s confession and other evidence in the case. The commission thus concluded that defendant’s claim “exhibits many of the standard characteristics of coerced, false confessions.”

c. Defendant filed a petition for relief in the circuit court based on the commission’s findings. The court conducted an evidentiary hearing on the claim. Defendant testified that when he was interrogated at Area 2, one of the officers hit him so hard he nearly passed out. The officers told defendant that unless he confessed to the ASA, the beating would continue.

The ASA testified that defendant voluntarily gave a full confession and signed a written summary of the confession. He saw no bruising or marks on defendant’s face and defendant told him he had been treated “all right.”

The circuit court found “absolutely no credible evidence” of torture and denied defendant’s claim. Defendant appealed, arguing that the findings of the commission were entitled to preclusive effect on the circuit court based on the doctrines of collateral estoppel and law of the case. The Appellate Court rejected both arguments.

3. The doctrine of collateral estoppel prevents the relitigation of issues resolved in an earlier cause of action. Collateral estoppel applies when: (1) the issue decided in the prior adjudication is identical to the one presented in the later case; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party in the prior adjudication.

The court held that collateral estoppel did not apply for several reasons. First, collateral estoppel does not apply to the type of non-judicial decision made by the commission. The commission does not conduct any adversarial proceedings and provides no procedural or evidentiary safeguards which are the essential elements of adjudication. Instead the commission serves an investigatory function, looking into claims of torture. Its findings thus do not involve the type of judicial findings necessary for collateral estoppel.

Second, the issue decided by the commission was not identical to the issue presented to the circuit court. The commission merely found that there was sufficient evidence to merit judicial review. The court by contrast was asked to determine whether defendant had been tortured. These were “two different questions determined by two different entities.”

Third, the commission’s decision was not a final judgment on the merits. A final judgment is a determination of the issues which ascertains and fixes absolutely and finally the rights of the parties. The commission’s decision did not ascertain or fix with finality the rights of any parties. It merely sent the case on to the circuit court.

4. The court also held that the law of the case doctrine did not apply. The law of the case doctrine bars relitigation of an issue previously decided in the same case. Here, the issue decided by the commission was not the same issue decided by the circuit court. There was thus no relitigation of a previous issue.

The circuit court’s decision was affirmed.

COUNSEL

§§13-1(c), 13-3(a)

Luis v. United States, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2016) (No. 14-419, 3/30/16)

A federal statute provided that in a prosecution for federal health care fraud, the U.S. Attorney may seek a pretrial order freezing certain of the defendant’s assets, including property obtained as a result of the crime, property traceable to the crime, and other “property of equivalent value.” Defendant was charged with committing health care fraud in the amount of \$45 million. The prosecution sought a pretrial order to freeze \$2 million in defendant’s possession so it would be available for restitution and criminal penalties. The parties agreed that the funds were not connected to the charged offenses and that the order would prevent defendant from being able to hire counsel.

The Supreme Court held that a pretrial order freezing assets which are not related to the charged crime would violate the Sixth Amendment right to hire counsel of choice.

1. A four-member plurality held that the Sixth Amendment right to the assistance of counsel is a fundamental right, and includes the right to counsel of choice provided that the defendant has sufficient assets to hire the chosen attorney. Although **Caplin & Drysdale, Chartered v. United States**, 491 U. S. 617 (1989) and **United States v. Monsanto**, 491 U. S. 600 (1989)) allowed orders forfeiting or freezing assets which the defendants would have used to pay counsel fees, in both cases the assets were “tainted” because they were traceable to the crime in question. Thus, in those cases the government had a “substantial interest” in the assets even before convictions were obtained.

Here, by contrast, the assets were untainted by any association with the crime. Thus, the government lacked any substantial interest in the assets before it obtained a conviction. The court concluded that insofar as the funds were needed for defendant to hire counsel of choice, the “competing interests” of the Sixth Amendment and the government’s right to secure “untainted” assets for forfeiture and restitution must be resolved in favor of the right to counsel of choice. The plurality also stressed that accepting the government’s position might erode the right to counsel because Congress could enact statutes authorizing pretrial restraint of assets for various types of criminal conduct.

The plurality also stated that the Government’s position would force more defendants to the indigent defense system, placing even more of a burden on “overworked and underpaid public defenders.” The plurality noted that according to the Department of Justice, only 27% of county-based public defender offices have sufficient staff to meet nationally recommended caseload standards.

Finally, the plurality acknowledged that money is fungible, but found that “the law has tracing rules” that make it possible to determine whether particular assets are “tainted” by the charged crime.

2. Justice Thomas concurred in the result, finding that the text and common-law background of the Sixth Amendment prohibit pretrial restraint of lawfully owned property needed to pay for counsel of choice. Justice Thomas agreed that only “tainted” assets may be subject to restraint before trial, but rejected the majority’s approach of balancing the interest of a criminal defendant in hiring counsel of choice with the government’s interest in assuring a fund for forfeitures, restitution, and criminal penalties. Justice Thomas also stressed that the Sixth Amendment includes the right to counsel of choice so long as the accused has the ability to hire such counsel, and found that allowing the Government to force all criminal defendants into the indigent defense system would nullify the original understanding of the framers of the Bill of Rights concerning the right to counsel.

§13-1(c)

People v. Adams, 2016 IL App (1st) 141135 (No. 1-14-1135, 3/15/16)

1. Defendants have a constitutional right to retain counsel of their choice. But that right is not absolute and cannot be used to thwart the administration of justice. Courts must balance a defendant's right to counsel of choice against the need for the efficient and effective administration of justice, and therefore must inquire into the reasons for the request so they can determine the validity of a defendant's request.

Courts should consider five factors in balancing these interests: (1) defendant's reasons for wanting new counsel; (2) defendant's continuous custody; (3) defendant's efforts to obtain new counsel; (4) defendant's cooperation with current counsel; and (5) how long current counsel represented defendant.

The trial court's decision to deny a continuance for substitution of counsel will only be reversed for an abuse of discretion. Generally, a trial court does not abuse its discretion by denying a continuance unless substitute counsel is ready and willing to represent defendant. But, even where new counsel is not readily available, a trial court will abuse its discretion if it fails to inquire into whether defendant is using the request as a delaying tactic.

2. Seventy days after defendant was arraigned, defendant appeared before the court for a bench trial. After the State answered ready for trial, defendant asked the court if he could get a continuance to retain private counsel. The court denied the request because it was the day of trial and both of the State's witnesses (police officers) were present.

3. The trial court abused its discretion in denying defendant's request. The trial court considered only two factors in ruling: that it was the day of trial and both witnesses were present. The court made no inquiry at all into defendant's reasons for wanting new counsel or efforts to obtain new counsel. Additionally, the case had been pending for only 70 days, no prior continuances had been requested, and defendant had been in continuous custody.

Reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Ben Wolowski, Chicago.)

§§13-2, 13-5(d)(3)(a)(1)

People v. Jackson, 2016 IL App (1st) 133741 (No. 1-13-3741, 3/10/16)

1. Under **People v. Krankel**, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), new counsel is not automatically required if a defendant raises a post-trial claim of ineffective

assistance of trial counsel. Instead, the trial court must make a preliminary examination of the factual basis for the claim. New counsel need not be appointed if the claim lacks merit or pertains only to matters of trial strategy.

If the allegations show possible neglect of the case, on the other hand, new counsel must be appointed to fully prosecute the ineffectiveness claim in the trial court. The **Krankel** procedure is intended to fully address *pro se* post-trial claims of ineffective assistance of counsel at the trial level and provide a sufficient record for the reviewing court to consider.

Here, the trial court erred by failing to conduct a preliminary inquiry and deciding whether to appoint independent counsel. Instead, the judge proceeded immediately to the merits of the issue and found that defendant had failed to establish ineffective assistance of counsel under the **Strickland** standard.

In addition, the trial court erroneously relied on evidence outside the record in rejecting defendant's claim that trial counsel had failed to conduct an adequate investigation. Furthermore, this case had been previously appealed and remanded, and upon remand the trial court misinterpreted the mandate and erroneously refused to consider one of defendant's issues.

Finally, the court erred by failing to inquire of trial counsel about defendant's complaints of ineffectiveness, and in fact failed to require defendant's lead counsel to even appear at the **Krankel** hearing. Although the trial judge need not automatically inquire of counsel during the preliminary phase of a **Krankel** hearing, some interchange between the court and counsel is usually necessary to assess what further action should be taken.

The cause was remanded for a further *Krankel* hearing.

2. A defendant has a constitutional right to represent himself so long as he knowingly and intelligently waives his right to counsel. The appropriate inquiry where a defendant wishes to represent himself is not the extent to which he is qualified or capable of doing so, but whether he is fully aware of the nature of the right to counsel and the consequences which may follow if counsel is waived. Thus, a defendant who requests to proceed *pro se* should be made aware of the dangers and disadvantages of self-representation so that the record will establish that he made his choice intelligently.

Defendant stated that he wanted to represent himself at the post-trial proceedings and sentencing hearing. The trial court asked if defendant understood the "perils" of representing himself. When defendant responded "no," the trial judge refused to allow the defendant to represent himself on the grounds that he was "not qualified."

Because the trial court failed to make the defendant aware of the dangers and disadvantages of self-representation, and concluded that he was unqualified merely because before he was admonished by the judge he did not understand the "perils" of

self-representation, the trial court erroneously denied defendant's right to self-representation.

3. Finally, the court concluded that where the trial judge criticized defendant for reading his *pro se* argument, corrected defendant's pronunciation of several words, and held defendant in contempt of court when he turned his back after stating that the judge was not being fair to him, the proceedings on remand should be conducted before a different judge.

(Defendant was represented by Assistant Defender David Harris, Chicago.)

§13-2

People v. Mitchell, 2016 IL App (2d) 140057 (Nos. 2-14-0057 & 2-14-0058 cons., 3/8/16)

1. A competent waiver of counsel carries forward to all subsequent proceedings unless a defendant later requests counsel. Courts must indulge every reasonable presumption against waiver and in favor of revocation of a prior waiver.

2. Defendant expressed dissatisfaction with his counsel, a public defender, and requested new counsel. When the court refused to appoint new counsel, defendant waived his right to counsel and proceeded *pro se*. In allowing defendant to represent himself, the court stated that it would not allow defendant to change his mind if he later realized that he needed counsel. He told defendant that he was "stuck with this choice" of representing himself, "no matter difficult it becomes."

A week later, but prior to the start of trial, defendant informed the court that he wanted counsel reappointed because he did not think he could represent himself. The court refused to reappoint counsel reminding defendant that he made the decision to represent himself knowing that he couldn't change his mind later. When defendant complained again about his prior counsel, the court again stated that he would not appoint other counsel.

Defendant reached a plea agreement with the State on that same day and pled guilty. Defendant later filed a motion to withdraw his plea arguing that the court erred in accepting his plea without reappointing counsel. The court denied the motion.

3. The Appellate Court held that the trial court improperly refused to reappoint counsel for defendant. The Court rejected the State's argument that defendant merely wanted the appointment of counsel other than the public defender. Despite defendant's misgivings about his prior counsel, it did not follow that he would have chosen to represent himself rather accept reappointment of prior counsel.

Since courts must make every reasonable presumption in favor of revocation of a prior waiver of counsel, the Court held that it must presume here that defendant realized the problems with representing himself and decided that he wanted the public defender reappointed. The trial court's refusal to reappoint counsel simply because he warned defendant that he couldn't change his mind was improper.

The cause was remanded with directions to allow defendant to withdraw his guilty plea.

(Defendant was represented by Deputy Defender Thomas Lillien, Elgin.)

§13-4(a)(1)

People v. Veach, 2016 IL App (4th) 130888 (No. 4-13-0888, 3/11/16)

1. Where a reviewing court must consider matters outside the record in order to decide whether trial counsel provided ineffective assistance, the issue is more appropriately addressed in post-conviction proceedings. To help clarify which cases raising ineffectiveness may be appropriately addressed on direct appeal, the Appellate Court suggested dividing such cases into three categories.

Category A: cases that the court should decline to address. These are cases where the appellate record is not adequate to determine whether counsel was ineffective. The record will typically be missing information about the communication between counsel and defendant and about counsel's trial strategy and tactics.

When faced with this type of case, the reviewing court should decline to address the issue, affirm the lower court's judgment, and indicate that defendant may raise the issue in a post-conviction petition.

Category B: cases that the court may address because they are clearly groundless. On rare occasions, the claim clearly has no merit and thus there is no need to examine the information that is typically missing from the direct appeal record.

Category C: cases that the court may address because trial counsel's errors were so egregious that the reviewing court can determine that trial counsel was ineffective without seeing further evidence. In such cases, the court must be able to conclude that no justifiable explanation for counsel's error could possibly exist.

2. Here, trial counsel agreed that video recordings should be admitted even though they contained prior consistent statements and bad character evidence. The court held that even though "at first blush" it was not clear why trial counsel agreed to admit this evidence, this was a Category A case that should not be addressed on direct appeal. The record contained no information about why counsel agreed to admit the evidence and

since this was not a case where no justifiable explanation for counsel's action could possibly exist, the court would need to improperly guess at counsel's motivation to resolve the issue.

The court thus declined to address defendant's claim, affirmed his convictions, and noted that defendant may raise his claim in a post-conviction petition.

3. The dissent believed that the record on appeal showed ineffective assistance of counsel and that delaying the claim until a post-conviction proceeding was improper.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

§13-4(a)(2)

People v. Higgins, 2016 IL App (3d) 140112 (No. 3-14-0112, 3/24/16)

1. Under **People v. Brocksmith**, 162 Ill. 2d, 224, 642 N.E.2d 1230 (1994), whether to submit a lesser-included offense instruction is one of five decisions which belong exclusively to the defendant and not to defense counsel. In **Brocksmith**, the court recognized that the decision to tender a lesser-included offense instruction is analogous to the decision to plead guilty and may result in a loss of liberty based on an uncharged offense.

2. Where defense counsel tenders a lesser-included defense instruction, the trial court must inquire of defense counsel, in defendant's presence, whether counsel has advised defendant of the potential penalties associated with the lesser-included offense and whether the defendant agrees with the decision to tender the lesser offense. **People v. Medina**, 221 Ill.2d 394, 851 N.E.2d 1220 (2006). Here, the court concluded that the trial court's duty to inquire applies only if defense counsel tenders the lesser-included offense instruction. Where the State requests a lesser-included offense instruction, the trial court need not ensure that defendant agrees with defense counsel's decision to not object to the instruction.

3. The court noted that in this case, the decision to not object to the lesser-included offense instruction appears to have been a valid and effective trial strategy. On the greater offense, defendant would have been subject to a sentencing range of 15 to 60 years. By not objecting the lesser-included offense instruction tendered by the State, defendant avoided a more serious conviction and received a sentence of 12 years, three years less than minimum sentence he could have received on the greater offense.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Joy Reedy, Chicago.)

§§13-4(a)(2), 13-4(b)(6)(c)

People v. Tayborn, 2016 IL App (3d) 130594 (No. 3-13-0594, 3/7/16)

1. An attorney's decision whether to file a motion to suppress statements is generally a matter of trial strategy that is entitled to great deference. To establish prejudice from substandard representation involving the failure to file a motion to suppress evidence, the defendant must show that a suppression motion would have succeeded and a reasonable probability that the outcome of the trial would have been different had the evidence been suppressed.

2. The court concluded that counsel was ineffective for failing to move to suppress a statement which defendant made as a result of custodial interrogation at the scene of a traffic stop. The court stressed that there was no reasonable strategy for failing to move to suppress defendant's statement that he was transporting cocaine, because the statement was the State's strongest evidence on charges of possession of cocaine and possession with intent to deliver. The court found that the motion would have been meritorious and there was a reasonable probability that the outcome of the trial would have been different in the absence of the statement.

Defendant's conviction was reversed and the cause remanded for further proceedings.

§13-4(b)(2)

People v. Armstrong, 2016 IL App (2d) 140358 (No. 2-14-0358, 3/22/16)

To establish ineffective assistance of counsel in a guilty plea context, defendant must show that (1) counsel's performance was objectively unreasonable, and (2) it is reasonably probable that absence counsel's deficient performance defendant would not have pled guilty.

Defendant entered a negotiated guilty plea to the offense of failing to register as a sex offender and was sentenced to three years in prison. On appeal, he argued that his counsel was ineffective for advising him to plead guilty where the prior 1997 offense on which his status as a sex offender depended was not actually a sex offense. The Appellate Court agreed.

Defendant's prior conviction for unlawful restraint would have been (at the time he pled guilty in 1997) a sex offense requiring registration only if the victim had been under 18 years old. Neither the complaint nor the information charging defendant with the offense made any reference to the victim's age. The State's factual basis did not mention the victim's age. And the written judgment order did not mention the victim's age or order defendant to register as a sex offender.

Under these circumstances, defendant's 1997 conviction for unlawful restraint did not make him subject to sex offender registration. The State's factual basis established the nature of the offense and thus defined the range of available consequences. Since the factual basis did not establish that the victim was under 18, the offense was not a sex offense and defendant was not subject to registration.

Counsel was ineffective for advising defendant to plead guilty to the offense of failing to register. If counsel had reviewed the record of defendant's 1997 conviction, counsel would have discovered that defendant had not been convicted of a sex offense. It was then reasonably probable that defendant would not have pled guilty since he could not have been properly convicted of failing to register.

The case was remanded to the circuit court to allow defendant to withdraw his plea.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

§13-4(b)(10)

People v. Meeks, 2016 IL App (2d) 140509 (No. 2-14-0509, 3/30/16)

1. The Sixth Amendment right to counsel includes the right to effective assistance of counsel on direct appeal. Where a claim of ineffective assistance of counsel is based on the failure to raise a particular issue, **Strickland v. Washington** applies. Thus, the defendant must show both that counsel's performance was objectively unreasonable and that had it not been for counsel's errors, there would have been a reasonable probability that the result of the proceeding would have been different.

By contrast, the **Strickland** standard does not apply where a claim of ineffective assistance of appellate counsel is predicated on counsel's failure to prosecute the appeal, resulting in its dismissal. A defendant is entitled to have a direct appeal with an appellate advocate, and cannot be deprived of that right on the ground that an appeal would have been unsuccessful.

2. Where retained appellate counsel unilaterally decided not to raise any issue on defendant's behalf, but instead refunded the retainer which defendant had paid and said that he had decided to work on a post-conviction petition, counsel functionally ceased to represent the defendant. The court acknowledged that appellate counsel is ethically bound to refrain from raising issues that have no arguable merit. Even where counsel believes there is no arguable merit to an appeal, however, he or she may not simply sit by and wait for the appeal to be dismissed for want of prosecution. Instead, the attorney has an ethical obligation to move to withdraw from representing defendant on appeal.

3. The court noted that had appellate counsel been court appointed rather than privately retained, he would have been required to comply with the procedure set forth in **Anders v. California**. Although there is no Illinois precedent concerning whether **Anders** applies to retained counsel, the court found that it need not resolve that question because even retained counsel was obliged to seek leave to withdraw once he concluded that no issues of merit could be raised.

Where the trial court erred by summarily dismissing a post-conviction petition which alleged ineffective assistance because retained appellate counsel failed to take any action in defendant's behalf, the court remanded the cause for second-stage post-conviction proceedings.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

§13-5(d)(3)(a)(1)

People v. Mourning, 2016 IL App (4th) 140270 (No. 4-14-0270, 3/31/16)

1. When a defendant files a post-trial claim of ineffective assistance, the trial court should first examine the factual basis of the claim. If the claim lacks merit then the court may deny the motion without appointing new counsel. But if the claim shows possible neglect, new counsel should be appointed.

To decide whether there was possible neglect, some interchange between the court and counsel regarding the facts and circumstances of the claim is permissible and usually necessary. But an interchange is not always necessary where the court can make its decision based on counsel's performance at trial and the facial insufficiency of defendant's claims.

2. Defendant hired private counsel to represent him at trial. Following his conviction, defendant filed a *pro se* letter in the trial court stating that he had "fired" his counsel because counsel never informed him of the possibility of a bench trial, failed to present certain evidence, and failed to impeach a witness. Defendant asked the court to appoint a public defender to represent him.

The court denied defendant's request without conducting any inquiry into defendant's claims. The court found that there was "no suggestion of any possible neglect" except "defendant disagreeing with trial strategy." The court further stated that defendant could not just "snap your fingers and get a different lawyer...at public expense, it doesn't work that way." The court gave defendant the option to hire new counsel, but defendant was unable to do so and continued through sentencing with his current counsel.

3. The Appellate Court held that the trial court failed to conduct an adequate hearing into defendant's claims. The court first rejected the State's argument that the trial court had no obligation to conduct any inquiry because defendant was represented by private counsel. The court could find no reason why in this context a defendant represented by private counsel should be treated differently than a defendant represented by appointed counsel, especially where the defendant is unable to hire substitute counsel and requests a public defender.

The court thus held that **Krankel** applies when a defendant represented by private counsel makes a claim of ineffectiveness and informs the court that he desires new counsel and cannot afford new private counsel.

4. The Appellate Court also found that the trial court improperly denied defendant's claims without conducting any interchange with defendant or counsel, incorrectly deciding that his claims were meritless on their face because they involved trial strategy. Defendant's claims about the right to a bench trial, failure to present evidence, and impeachment of a witness all required some questioning to uncover their underlying factual basis. The trial court's preliminary inquiry was thus insufficient.

The court remanded the case for a new preliminary hearing into defendant's claims.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

DISCOVERY

§15-1

People v. Gray, 2016 IL App (2d) 140002 (No. 2-14-0002, 3/2/16)

In **United States v. Ruiz**, 536 U.S. 622 (2002), the Supreme Court held that the State was not required to disclose material impeachment evidence before entering a plea agreement with a defendant.

Here defendant entered a fully negotiated guilty plea. He later filed a post-conviction petition alleging that he agreed to plead guilty primarily because he feared a trier of fact would believe the State's three key witnesses. Later, he learned that all three witnesses had been indicted on criminal charges. Defendant contended that he could have used this information to impeach the witnesses at trial. The State, however, failed to disclose this evidence prior to his guilty plea. If defendant had been aware of these charges, he would not have pleaded guilty.

The Appellate Court held that under **Ruiz**, the State had no obligation to disclose this potential impeachment evidence before defendant pled guilty. The evidence could have been used for impeachment only and was not otherwise exculpatory.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin)

EVIDENCE

§§19-10(b), 19-10(d)

People v. Weinke, 2016 IL App (1st) 141196 (No. 1-14-1196, 3/1/16)

1. On the first day defendant appeared in court, the prosecutor asked the court for permission to conduct a video deposition of the victim to preserve her testimony, asserting that she had suffered critical injuries and it was unclear how long she would survive. Defendant objected to the request.

On the following day, the prosecutor filed a written motion pursuant to Supreme Court Rule 414 requesting that a video deposition be taken that afternoon due to the “substantial possibility” that the victim would be unavailable for trial. The motion contained no details or documentation, but the prosecutor stated that the victim was due for surgery a few days later and her injuries were very extensive. Defendant again objected stating that he was not prepared to cross-examine the victim. The prosecutor stated that based on her review of the medical records and conversations with the victim’s physicians, she might not survive her upcoming surgery.

The court granted the motion and scheduled the deposition that afternoon. Defendant again objected on the basis that he had no time to prepare. When the prosecutor again asserted that the victim might not survive much longer, the court stated that it was granting the motion based on the prosecutor’s representation as to the severity of the victim’s condition and the chance that she might not survive.

The deposition was taken that afternoon and the victim died two months later prior to trial. At trial, the State moved to admit the deposition. Defendant objected arguing that the lack of notice deprived him of an opportunity to effectively cross-examine the victim. Defendant also submitted the victim’s medical records and contended that the prosecution had provided the court with inaccurate information about her condition by exaggerating the extent of her injuries and the seriousness of her condition, and by falsely claiming that its information had come from the treating physicians.

The trial court allowed the deposition into evidence and following a bench trial convicted defendant of first degree murder. The Appellate Court held that the deposition was improperly admitted.

2. First, the court held that as a matter of law the State failed to meet its burden under Rule 414 of providing the court with evidence that the deposition was necessary because there was a substantial possibility that the witness would be unavailable at trial. Ill. S. Ct. R. 414. The State's written motion was "perfunctory, cursory, and without any supporting documentation."

Instead, the State relied on its oral assertions about the victim's injuries and medical condition. But none of these assertions constituted evidence. They were simply assertions. The court thus found that even if the assertions had been accurate, they did not satisfy the rule's requirement that at least some evidence is needed to satisfy the movant's burden. Additionally, the court found that many of the State's assertions were "false, misleading, or both." The State seriously exaggerated the victim's injuries and her medical condition, as well as the source of its information.

Allowing the deposition to be taken before defendant had an opportunity to investigate the case and develop evidence gave the defense virtually no ability to fulfill its necessary adversarial function. Under these circumstances, granting the deposition was reversible error.

3. The court also found that the admission of the deposition violated defendant's right to confront witnesses under the federal and Illinois constitutions. Preexisting testimony is admissible if the witness is unavailable at trial and defendant had an adequate opportunity to effectively cross-examine the witness. To determine whether a defendant had an adequate opportunity for cross-examination, courts examine the motive and focus of the prior cross-examination, whether the cross was unlimited, and what counsel knew when conducting the examination.

The court found that here the motive was the same and that there was no limit placed on counsel's cross. But the focus of the cross would have been different at trial because counsel was not prepared to question whether the evidence supported defendant's guilt because he had no opportunity to prepare for the hastily convened deposition. Additionally, counsel was at a "severe informational disadvantage" due to his inability to prepare. Thus, since counsel did not have an adequate opportunity to cross-examine the witness, the use of the deposition at trial violated defendant's right to confrontation.

Defendant's conviction was reversed and remanded for a new trial.

§19-14(a)

People v. Abram, 2016 IL App (1st) 132785 (No. 1-13-2785, 3/7/16)

At defendant's trial for possession of a controlled substance with intent to deliver, the trial court admitted an audio recording of hearsay statements made by a police officer during a chase of defendant's car. During the chase, defendant threw packages of cocaine

out the window. The recording contained communications by a pursuing officer to headquarters and other officers, and described defendant's actions during the chase.

1. The court concluded that the hearsay statements on the tape were not admissible under the "present sense impression" hearsay exception. Although such an exception is recognized under the Federal Rules of Evidence, neither Illinois courts nor the Illinois Rules of Evidence recognize it.

2. However, the trial court did not abuse its discretion by finding that the hearsay statements qualified as excited utterances. A statement is admissible as an excited utterance where it relates to a startling event or condition and was made while the declarant was under the stress of excitement caused by the event or condition. The exception rests on the theory that an event may be so startling that it temporarily stills the capacity for reflection and produces statements that are free of conscious fabrication. Thus, what makes a statement presumptively trustworthy as an excited utterance is the presence of a sudden, startling event which deprives the declarant of an opportunity to reflect. In determining whether a statement qualifies as an excited utterance, courts consider the totality of the circumstances including the time elapsed between the event and the utterance, the nature of the event, the declarant's mental and physical condition, and the presence of self-interest.

Here, the statements clearly related to police efforts to apprehend defendant and were made contemporaneously with the events described. Thus, the critical question was whether the pursuit of a suspect by police is a sufficiently startling event to permit the officer's statements to be admitted as excited utterances.

Although the officer's voice was relatively calm throughout the recording and the officer testified that he was part of an operation which was routinely sent to high crime areas in the city to interdict violent crimes, the court noted that he also testified that at the time of the pursuit he did not know whether a second person was in defendant's car or whether defendant was armed. The court concluded that under these circumstances, it could not be said that the trial court erred by concluding that the statements qualified as excited utterances.

Defendant's conviction was affirmed.

§19-24(b)(4)

People v. Gregory, 2016 IL App (2d) 140294 (No. 2-14-0294, 3/30/16)

Other-crimes evidence is admissible to prove any material fact relevant to the case, including defendant's identity. But it is not admissible if it only shows the defendant's propensity to engage in criminal activity.

After a jury trial, defendant was convicted of threatening a public official and cyberstalking based on a number of e-mails he sent to various public officials with the Village of Oswego and the Oswego police department. These emails contained angry and profanity-laden complaints about perceived official misconduct along with thinly veiled threats against the officials and their families.

At trial, the State also introduced 10 letters defendant sent to the Oswego police department after he was arrested in this case. These letters contained large amounts of profanity and other derogatory language and generally complained that the charges against him were baseless. They also referred to other crimes and bad acts by defendant, including acts of domestic violence, traffic offenses, accusations of being a drug dealer, and a poor employment history.

The court held that such evidence was not admissible. Although portions of the letters were relevant to the issue of identity as they provided circumstantial evidence that defendant sent the emails in question, they also contained a large amount of other-crimes evidence that the State “does not even argue was relevant.” Moreover, the evidence of unrelated offenses was so voluminous and inflammatory that there was a great risk the jury would find defendant guilty because of his propensity to commit crimes.

The court reversed defendant’s convictions and remanded for a new trial.

(Defendant was represented by Assistant Defender Chris McCoy, Elgin.)

GUILTY PLEAS

§24-1

People v. Gray, 2016 IL App (2d) 140002 (No. 2-14-0002, 3/2/16)

In **United States v. Ruiz**, 536 U.S. 622 (2002), the Supreme Court held that the State was not required to disclose material impeachment evidence before entering a plea agreement with a defendant.

Here defendant entered a fully negotiated guilty plea. He later filed a post-conviction petition alleging that he agreed to plead guilty primarily because he feared a trier of fact would believe the State’s three key witnesses. Later, he learned that all three witnesses had been indicted on criminal charges. Defendant contended that he could have used this information to impeach the witnesses at trial. The State, however, failed to disclose this evidence prior to his guilty plea. If defendant had been aware of these charges, he would not have pleaded guilty.

The Appellate Court held that under **Ruiz**, the State had no obligation to disclose this potential impeachment evidence before defendant pled guilty. The evidence could have been used for impeachment only and was not otherwise exculpatory.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin)

§24-7

People v. Armstrong, 2016 IL App (2d) 140358 (No. 2-14-0358, 3/22/16)

To establish ineffective assistance of counsel in a guilty plea context, defendant must show that (1) counsel's performance was objectively unreasonable, and (2) it is reasonably probable that absence counsel's deficient performance defendant would not have pled guilty.

Defendant entered a negotiated guilty plea to the offense of failing to register as a sex offender and was sentenced to three years in prison. On appeal, he argued that his counsel was ineffective for advising him to plead guilty where the prior 1997 offense on which his status as a sex offender depended was not actually a sex offense. The Appellate Court agreed.

Defendant's prior conviction for unlawful restraint would have been (at the time he pled guilty in 1997) a sex offense requiring registration only if the victim had been under 18 years old. Neither the complaint nor the information charging defendant with the offense made any reference to the victim's age. The State's factual basis did not mention the victim's age. And the written judgment order did not mention the victim's age or order defendant to register as a sex offender.

Under these circumstances, defendant's 1997 conviction for unlawful restraint did not make him subject to sex offender registration. The State's factual basis established the nature of the offense and thus defined the range of available consequences. Since the factual basis did not establish that the victim was under 18, the offense was not a sex offense and defendant was not subject to registration.

Counsel was ineffective for advising defendant to plead guilty to the offense of failing to register. If counsel had reviewed the record of defendant's 1997 conviction, counsel would have discovered that defendant had not been convicted of a sex offense. It was then reasonably probable that defendant would not have pled guilty since he could not have been properly convicted of failing to register.

The case was remanded to the circuit court to allow defendant to withdraw his plea.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

JURY

§§32-8(a), 32-8(I)

People v. Higgins, 2016 IL App (3d) 140112 (No. 3-14-0112, 3/24/16)

1. Under **People v. Brocksmith**, 162 Ill. 2d, 224, 642 N.E.2d 1230 (1994), whether to submit a lesser-included offense instruction is one of five decisions which belong exclusively to the defendant and not to defense counsel. In **Brocksmith**, the court recognized that the decision to tender a lesser-included offense instruction is analogous to the decision to plead guilty and may result in a loss of liberty based on an uncharged offense.

2. Where defense counsel tenders a lesser-included defense instruction, the trial court must inquire of defense counsel, in defendant's presence, whether counsel has advised defendant of the potential penalties associated with the lesser-included offense and whether the defendant agrees with the decision to tender the lesser offense. **People v. Medina**, 221 Ill.2d 394, 851 N.E.2d 1220 (2006). Here, the court concluded that the trial court's duty to inquire applies only if defense counsel tenders the lesser-included offense instruction. Where the State requests a lesser-included offense instruction, the trial court need not ensure that defendant agrees with defense counsel's decision to not object to the instruction.

3. The court noted that in this case, the decision to not object to the lesser-included offense instruction appears to have been a valid and effective trial strategy. On the greater offense, defendant would have been subject to a sentencing range of 15 to 60 years. By not objecting the lesser-included offense instruction tendered by the State, defendant avoided a more serious conviction and received a sentence of 12 years, three years less than minimum sentence he could have received on the greater offense.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Joy Reedy, Chicago.)

JUVENILE

§33-6(d)

People v. Holman, 2016 IL App (5th) 100587-B (5-10-0587, 3/3/16)

1. Under United States Supreme Court case law, the Eighth Amendment prohibits a mandatory natural life sentence without the possibility of parole for offenses committed by juveniles. The Eighth Amendment requires that the sentencing court take into account factors which differentiate children from adults, including that juveniles are less mature

than adults, are more likely to be rehabilitated, are more susceptible to outside influences, and have both diminished culpability and heightened capacity for change.

The court noted a conflict in authority concerning the duty of a court sentencing a juvenile to consider mitigating evidence. Some jurisdictions have required the sentencing court to consider a specified list of mitigating factors, while other jurisdictions require only that mitigation be considered, without mandating a specific list of factors. Still other jurisdictions provide that the Eighth Amendment is satisfied so long as the sentencing court has discretion to impose a sentence other than natural life without the possibility of parole.

The Appellate Court resolved this conflict by finding that the sentencing court must consider mitigating circumstances relating to a juvenile defendant's youth but need not consider a specified list of factors. Thus, the Eighth Amendment is satisfied if the record shows that the trial court considered mitigating circumstances concerning the juvenile's situation.

2. The court rejected defendant's argument that at sentencing, the trial court failed to consider mitigating circumstances. Defendant was sentenced to natural life without the possibility of parole for a murder which occurred five weeks before he turned 18.

The court concluded that the sentencing court was aware of several mitigating factors which were mentioned in the pre-sentence report, and knew that defendant was a juvenile at the time of the offense. A sentencing court is presumed to take into account mitigating evidence which is before it.

In addition, there was substantial aggravating evidence. Under these circumstances, the trial court's statement that it found "no mitigating factors" did not indicate that it had refused to consider mitigating evidence related to the minor's youth.

3. The court rejected the argument that **Miller** should be extended to require a categorical bar against discretionary sentences of natural life in prison without the possibility of parole for offenses committed by juveniles. The court found that there is no reason to believe that the "societal standards of decency" have evolved since **Miller v. Alabama**, 567 U.S. ___, 132 S. Ct. 2455, 183 L.Ed. 2d 407 (2012) and **Montgomery v. Louisiana**, 577 U.S. ___, 136 S. Ct. 718, 193 L.Ed. 2d 599 (2016) so as to require the Appellate Court to go beyond the scope of those opinions.

(Defendant was represented by Assistant Defender Robert Burke, Mt. Vernon.)

§33-6(d)

People v. Nieto, 2016 IL App (1st) 121604 (No. 1-12-1604, 3/23/16)

1. Under the Post-Conviction Hearing Act, any claim not raised in the original or amended post-conviction petition is waived. This rule is more than a suggestion and reviewing courts generally may not overlook forfeiture caused by defendant's failure to raise the issue in his petition.

2. A jury convicted defendant, who was 17 years old at the time of the offense, of first degree murder and aggravated battery with a firearm, and additionally found that defendant personally discharged a firearm which proximately caused death, making the minimum sentence 51 years imprisonment. The court sentenced defendant to 78 years imprisonment. In imposing sentence, the court stated that it had considered defendant's "young age" and the fact that everyone can change their lives.

The Appellate Court affirmed defendant's conviction and sentence on direct appeal, specifically holding that his sentence was not excessive. Defendant filed a post-conviction petition raising several claims, but did not argue that his sentence was unconstitutional. After the trial court dismissed his petition at the first stage, the United States Supreme Court held in **Miller v. Alabama**, 567 U.S. ____ (2012) that the Eighth Amendment prohibited mandatory sentences of life imprisonment for juveniles.

On appeal from the denial of his post-conviction petition, defendant argued for the first time that his sentence was unconstitutional under **Miller**. Defendant conceded that he did not raise this issue in his petition, but argued that an as-applied constitutional challenge to a sentence can be raised for the first time on appeal.

3. The Appellate Court examined several cases that followed **Miller** and determined that it could reach defendant's claim. In **People v. Davis**, 2014 IL 115595, the Illinois Supreme Court held that the sentencing statute mandating life sentences was not facially unconstitutional since it could be validly applied to adults. In **People v. Thompson**, 2015 IL 118151, the court held that a judgment based on facially unconstitutional statute is void and may be attacked at any time. The same was not true for an as-applied challenge.

But **Thompson** also discussed **People v. Luciano**, 2013 IL App (2d) 110792, which held that an as-applied sentencing challenge by a juvenile could be raised at any time. The Supreme Court did not expressly find that **Luciano** was incorrect in its forfeiture holding, but instead distinguished it on the merits since the defendant in **Thompson** was not a juvenile. The Appellate Court thus concluded that "considered as a whole, **Thompson** implies that courts must overlook forfeiture and review juveniles' as-applied Eighth Amendment challenges under **Miller**."

Additionally, in **Montgomery v. Louisiana**, 577 U.S. ____ (2016), the United States Supreme Court held that **Miller** announced a substantive rule that barred life sentences for all but the rarest of juvenile defendants, and courts lack authority to leave in place

a sentence which violates a substantive rule. **Thompson** and **Montgomery** thus suggest that forfeiture cannot apply to juvenile defendants raising **Miller** claims.

4. The Appellate Court held that defendant's sentence was unconstitutional as applied to him. Since defendant would not be released from prison until he is 94 years old, the court found that he effectively received a natural life sentence.

Montgomery held that a life sentence was impermissible "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Even if a court considers a defendant's age, as the court did here, a life sentence is still impermissible for a defendant whose crime "reflects unfortunate yet transient immaturity."

Here the trial court's reasoning in imposing sentence did not comport with the factors required by **Miller** and **Montgomery**. The trial court considered defendant's young age but did not consider the corresponding characteristics of his youth. His sentence thus violated **Miller**.

Although relief following a first-stage dismissal typically involves remand for second-stage proceedings, the proper relief for this claim was to vacate defendant's sentence and remand for resentencing.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

ROBBERY

§§43-1, 43-4

People v. Clark, 2016 IL 118845 (No. 118845, 3/24/16)

1. A defendant may not be convicted of an uncharged offense, unless it is a lesser-included offense of the charged offense and the trial evidence rationally supports conviction on the lesser offense and acquittal on the greater offense. Courts use the charging instrument approach in determining whether an uncharged offense is a lesser-included offense.

2. The State charged defendant with aggravated vehicular hijacking while armed with a firearm (720 ILCS 5/18-4(a)(4)) and armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2)). Following a bench trial, the court acknowledged that defendant committed the offenses while armed with a gun, but determined that the gun was used as a bludgeon "and will be treated as such." The court thus found defendant guilty of aggravated vehicular hijacking and armed robbery without a firearm. Defendant did not object to this finding.

3. Both the aggravated vehicular hijacking and armed robbery statutes make a clear distinction between committing these offenses while being armed with either (1) a firearm or (2) a dangerous weapon other than a firearm. 720 ILCS 5/18-2(a)(1), (2); 720 ILCS 5/18-4(a)(3), (4).

The Illinois Supreme Court held that it “would have to stretch plain meaning and common understanding beyond a semblance of reason” to find that charging defendant with committing these offenses while armed with a firearm gave him notice that he was also charged with committing these offenses while armed with a dangerous weapon other than a firearm. The plain language of these statutes shows that the different offenses are mutually exclusive of each other. The offenses of aggravated vehicular hijacking and armed robbery without a firearm are not lesser-included offenses of the charged offenses.

4. Although defendant did not object to this error, the Supreme Court found that it was cognizable and remedial under the second prong of plain error. Plain error is applicable when clear or obvious error occurs and: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error; or (2) the error is so serious that it affected the fairness of defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

The court first held that the error here was clear since the two offenses as defined in the relevant statutes are mutually exclusive of each other. The court also found that the error challenged the integrity of the judicial process. Although the trial court may have attempted to afford defendant some benefit by convicting him of using a weapon other than a firearm (when all of the evidence showed that he did in fact possess a firearm), the result of the trial court’s actions was that defendant was convicted of offenses that he was not charged with and did not commit. Permitting unauthorized convictions to stand challenges the integrity of the judicial process.

In reaching this decision, the court specifically declined to limit the second prong of plain error to the six types of structural error recognized by the United States Supreme Court.

The court affirmed the lower court’s judgment reducing defendant’s convictions to vehicular hijacking and robbery and remanding the case for resentencing.

(Defendant was represented by Assistant Defender Gil Lenz, Chicago.)

SEARCH AND SEIZURE

§§44-1(a), 44-4(b)

People v. Abram, 2016 IL App (1st) 132785 (No. 1-13-2785, 3/7/16)

1. The United States Constitution and the Illinois Constitution protect individuals from unreasonable searches and seizures. Not every encounter between a police officer and a private citizen involves a “seizure,” however. A person is “seized” only when, as a result of physical force or a show of authority, a reasonable person would believe he was not free to leave. In addition, a person must submit to a show of authority in order for a seizure to occur.

While investigating a report of three males in possession of rifles, two police officers exited their vehicle and started walking toward the defendant’s car, in which defendant was sitting alone. Defendant immediately put his car in reverse and drove out of the alley. A vehicle chase ensued for several minutes, and ended when defendant drove into the parking lot of a police station and was taken into custody.

During the chase, officers saw items being tossed out of the driver’s side window of the vehicle. Packages containing cocaine were recovered from locations along the chase route and from the driver’s seat in the vehicle.

The court concluded that the defendant was not “seized” when the officers exited their vehicle and approached him to conduct an investigative interview. The officers applied no physical force, made no show of authority, and did not restrain defendant’s liberty in any way. In addition, the officers did not activate their emergency lights.

When defendant started to drive away, one of the officers yelled at him to stop. Although the order constituted a show of authority, no seizure occurred until defendant submitted to that authority. Because defendant did not submit until he drove into the lot of the police station, a “seizure” occurred only at that point.

2. The court added that even had defendant submitted to the show of authority at some point during the chase, the resulting seizure would have been justified. Even in the absence of probable cause for an arrest, a police officer may detain and question an individual upon observing unusual conduct which leads to a reasonable conclusion that criminal activity may be afoot. Unprovoked flight can be a basis for reasonable suspicion.

The court rejected the argument that defendant’s flight was provoked, noting that defendant rapidly drove out of the alley in reverse and engaged in a car chase during which he sped, drove the wrong way down one-way streets, disobeyed traffic signals, drove across an abandoned lot, and at one point drove onto a sidewalk. Although a person may refuse to cooperate with officers and go about his business, defendant’s actions were not a rational response to two officers approaching on foot and instead gave rise to a reasonable suspicion that criminal activity was occurring.

Defendant's conviction was affirmed.

§§44-1(c)(2), 44-2, 44-9, 44-16

People v. Burns, 2016 IL 118973 (No. 118973, 3/24/16)

1. For Fourth Amendment purposes, “curtilage” consists of the area immediately surrounding and intimately associated with a home. In **Florida v. Jardines**, 569 U.S. ___, 133 S. Ct. 1409, 185 N.E.2d 495 (2013), the United States Supreme Court held that the porch of a private residence was part of the curtilage, and that a dog sniff conducted by a canine which was brought onto the porch therefore constituted a “search” under the Fourth Amendment.

The **Jardines** majority based its holding on the homeowner's property rights, but a concurring opinion found that the search also constituted a Fourth Amendment violation based on privacy grounds. The majority stressed that because there was a physical intrusion into a protected area, it need not conduct a “reasonable expectation of privacy” analysis.

In the course of the **Jardines** opinion, the court noted that although there is an implicit license for individuals to approach a home, knock, wait to be received, and leave unless invited to stay, that implicit license does not extend to bringing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence.

2. Here, the court rejected the argument that **Jardines** applies only to single-family residences and not to leased apartments or condominiums where a canine sniff is conducted from common areas of multi-unit buildings. Police received an anonymous tip that defendant was selling marijuana out of her apartment, and gained access to the common area of her three-story apartment building by knocking on the door and being allowed in by another resident. The common areas of the building were not accessible to the general public.

Officers then used a trained dog to conduct a sniff of the third floor landing outside defendant's apartment. One other apartment and a storage closet shared the landing. The dog alerted outside defendant's door.

The court rejected the State's argument that the landing was not part of the “curtilage” of defendant's apartment. The curtilage consists of areas that are intimately connected to the activities of the home. Defendant lived in a locked building to which the public had no access unless admitted by a resident. The landing was immediately in front of defendant's apartment door, and by its nature was limited to use by defendant and the occupants of the other apartment on the third floor. The court also noted that the search occurred in the early morning hours, when a resident might reasonably expect

that persons will not come to the door without an invitation. Under these circumstances, the landing qualified as curtilage.

3. The court rejected the State's argument that the good faith exception should apply. Under 725 ILCS 5/114-12(b)(1), (b)(2), the trial court shall not suppress evidence which is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer pursuant to: (1) a search or an arrest warrant obtained from a neutral and detached judge where the warrant was free from obvious defects other than non-deliberate errors in preparation, contained no material misrepresentation by any agent of the State, and was reasonably believed by the officer to be valid, or (2) a warrantless search incident to an arrest for violation of a statute or local ordinance which is later declared unconstitutional. The U.S. Supreme Court has expanded the good-faith exception to include good-faith reliance upon binding appellate precedent that specifically authorized a particular practice but was subsequently overruled. **Davis v. United States**, 564 U.S. 229, ___, 131 S. Ct. 2419, 2429 (2011).

The court concluded that there was no binding Illinois precedent permitting the canine search which occurred here, and that there is precedent from the Appellate Court that the Fourth Amendment applies to the common areas of a locked apartment building. Under these circumstances, there was no binding precedent authorizing the search on which the officers could rely.

4. The court rejected the argument that the anonymous tip and the corroboration obtained by police were sufficient to constitute probable cause even without the alert by the drug dog.

The Appellate Court's order affirming the suppression order entered by the trial court was affirmed.

§§44-1(c)(3), 44-8(c)

People v. Carter, 2016 IL App (3d) 140958 (No. 3-14-0958, 3/29/16)

The police searched defendant's home pursuant to a search warrant. When the search had been completed and all the officers were outside the home, they received additional information that defendant had a gun inside the home which had not been discovered during the preceding search. The officers re-entered the home and retrieved the gun.

The trial court granted defendant's motion to suppress the gun. The State conceded on appeal that the search warrant did not authorize the re-entry and second search of the home. Instead, the State argued that the gun would have been found pursuant to

the inevitable discovery doctrine because a second search warrant could have been obtained.

The Appellate Court rejected the State's argument. The State's claim that the discovery was inevitable because the police planned to get a search warrant would as a practical matter place police action beyond judicial review and emasculate the warrant requirement.

The trial court's order suppressing the evidence was affirmed.

(Defendant was represented by Assistant Defender Kelly Craig, Ottawa.)

§§44-1(d), 44-4(b), 44-12(a)

People v. Timmsen, 2016 IL 118181 (No. 118181, 3/24/16)

1. Under **Terry v. Ohio**, an officer may conduct an investigatory stop if there is a reasonable suspicion that criminal activity has happened or is about to occur. A reasonable suspicion must amount to more than an unparticularized hunch. An investigatory stop must be justified at its inception by specific and articulable facts which justify a governmental intrusion into constitutionally protected interests.

In the absence of reasonable suspicion, an individual has the right to avoid an encounter with police and go about his or her business. A refusal to cooperate with police, without more, does not amount to reasonable suspicion of criminal activity.

2. At 1:15 a.m. on a Saturday, defendant made a legal U-turn some 50 feet before reaching a State Police safety roadblock. The roadblock was placed on a four-lane highway just across the border between Illinois and Iowa. Defendant made the U-turn at a railroad crossing which was the only place to turn around before reaching the roadblock.

The court concluded that making a U-turn just before reaching a roadblock is a legitimate factor to consider in determining whether there is a reasonable suspicion of criminal activity. The court rejected the argument that making a U-turn near a roadblock is no more than the driver's decision to simply go about his business:

Defendant's U-turn upon encountering the police roadblock was the opposite of defendant going about his business. Continuing eastbound on the highway would have been going about his business. We cannot view defendant's evasive behavior under these circumstances as simply a refusal to cooperate.

The court rejected the State's argument that the act of avoiding a roadblock is in and of itself sufficient to create a reasonable inference of criminal activity. Whether there is a reasonable suspicion of criminal activity is based on the totality of the circumstances and not on any factor in isolation.

3. The court also found that the totality of the circumstances justified a reasonable inference that criminal activity was afoot. The encounter occurred in the early morning hours, the roadblock was well marked and could not have been confused with an accident, and the roadblock was not busy and would not have caused a significant delay.

4. In dissent, Justice Burke agreed with the majority that where a driver is not engaged in criminal activity, the mere fact that he or she elects to avoid an encounter with police does not create an inference of criminal activity. However, Justice Burke rejected the majority's conclusion that there was a reasonable inference of criminal activity. Justice Burke noted that the U-turn was legal and that defendant did not speed or make his tires squeal.

Justice Burke also rejected the majority's conclusion that the time of day and whether a roadblock is busy are relevant factors in determining whether there is a reasonable suspicion of criminal activity. Justice Burke concluded, "[T]he only thing that occurred in this case is that defendant chose to avoid an encounter with the police, something he had the right to do."

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

SENTENCING

§45-1(a)

People v. Holman, 2016 IL App (5th) 100587-B (5-10-0587, 3/3/16)

1. Under United States Supreme Court case law, the Eighth Amendment prohibits a mandatory natural life sentence without the possibility of parole for offenses committed by juveniles. The Eighth Amendment requires that the sentencing court take into account factors which differentiate children from adults, including that juveniles are less mature than adults, are more likely to be rehabilitated, are more susceptible to outside influences, and have both diminished culpability and heightened capacity for change.

The court noted a conflict in authority concerning the duty of a court sentencing a juvenile to consider mitigating evidence. Some jurisdictions have required the sentencing court to consider a specified list of mitigating factors, while other jurisdictions require only that mitigation be considered, without mandating a specific list of factors. Still other jurisdictions provide that the Eighth Amendment is satisfied so long as the

sentencing court has discretion to impose a sentence other than natural life without the possibility of parole.

The Appellate Court resolved this conflict by finding that the sentencing court must consider mitigating circumstances relating to a juvenile defendant's youth but need not consider a specified list of factors. Thus, the Eighth Amendment is satisfied if the record shows that the trial court considered mitigating circumstances concerning the juvenile's situation.

2. The court rejected defendant's argument that at sentencing, the trial court failed to consider mitigating circumstances. Defendant was sentenced to natural life without the possibility of parole for a murder which occurred five weeks before he turned 18.

The court concluded that the sentencing court was aware of several mitigating factors which were mentioned in the pre-sentence report, and knew that defendant was a juvenile at the time of the offense. A sentencing court is presumed to take into account mitigating evidence which is before it.

In addition, there was substantial aggravating evidence. Under these circumstances, the trial court's statement that it found "no mitigating factors" did not indicate that it had refused to consider mitigating evidence related to the minor's youth.

3. The court rejected the argument that **Miller** should be extended to require a categorical bar against discretionary sentences of natural life in prison without the possibility of parole for offenses committed by juveniles. The court found that there is no reason to believe that the "societal standards of decency" have evolved since **Miller v. Alabama**, 567 U.S. ___, 132 S. Ct. 2455, 183 L.Ed. 2d 407 (2012) and **Montgomery v. Louisiana**, 577 U.S. ___, 136 S. Ct. 718, 193 L.Ed. 2d 599 (2016) so as to require the Appellate Court to go beyond the scope of those opinions.

(Defendant was represented by Assistant Defender Robert Burke, Mt. Vernon.)

§45-1(b)(2)

People v. Nieto, 2016 IL App (1st) 121604 (No. 1-12-1604, 3/23/16)

1. Under the Post-Conviction Hearing Act, any claim not raised in the original or amended post-conviction petition is waived. This rule is more than a suggestion and reviewing courts generally may not overlook forfeiture caused by defendant's failure to raise the issue in his petition.

2. A jury convicted defendant, who was 17 years old at the time of the offense, of first degree murder and aggravated battery with a firearm, and additionally found that defendant personally discharged a firearm which proximately caused death, making

the minimum sentence 51 years imprisonment. The court sentenced defendant to 78 years imprisonment. In imposing sentence, the court stated that it had considered defendant's "young age" and the fact that everyone can change their lives.

The Appellate Court affirmed defendant's conviction and sentence on direct appeal, specifically holding that his sentence was not excessive. Defendant filed a post-conviction petition raising several claims, but did not argue that his sentence was unconstitutional. After the trial court dismissed his petition at the first stage, the United States Supreme Court held in **Miller v. Alabama**, 567 U.S. ____ (2012) that the Eighth Amendment prohibited mandatory sentences of life imprisonment for juveniles.

On appeal from the denial of his post-conviction petition, defendant argued for the first time that his sentence was unconstitutional under **Miller**. Defendant conceded that he did not raise this issue in his petition, but argued that an as-applied constitutional challenge to a sentence can be raised for the first time on appeal.

3. The Appellate Court examined several cases that followed **Miller** and determined that it could reach defendant's claim. In **People v. Davis**, 2014 IL 115595, the Illinois Supreme Court held that the sentencing statute mandating life sentences was not facially unconstitutional since it could be validly applied to adults. In **People v. Thompson**, 2015 IL 118151, the court held that a judgment based on facially unconstitutional statute is void and may be attacked at any time. The same was not true for an as-applied challenge.

But **Thompson** also discussed **People v. Luciano**, 2013 IL App (2d) 110792, which held that an as-applied sentencing challenge by a juvenile could be raised at any time. The Supreme Court did not expressly find that **Luciano** was incorrect in its forfeiture holding, but instead distinguished it on the merits since the defendant in **Thompson** was not a juvenile. The Appellate Court thus concluded that "considered as a whole, **Thompson** implies that courts must overlook forfeiture and review juveniles' as-applied Eighth Amendment challenges under **Miller**."

Additionally, in **Montgomery v. Louisiana**, 577 U.S. ____ (2016), the United States Supreme Court held that **Miller** announced a substantive rule that barred life sentences for all but the rarest of juvenile defendants, and courts lack authority to leave in place a sentence which violates a substantive rule. **Thompson** and **Montgomery** thus suggest that forfeiture cannot apply to juvenile defendants raising **Miller** claims.

4. The Appellate Court held that defendant's sentence was unconstitutional as applied to him. Since defendant would not be released from prison until he is 94 years old, the court found that he effectively received a natural life sentence.

Montgomery held that a life sentence was impermissible "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." Even if a court considers a defendant's age, as the court did here, a life sentence is still

impermissible for a defendant whose crime “reflects unfortunate yet transient immaturity.”

Here the trial court’s reasoning in imposing sentence did not comport with the factors required by **Miller** and **Montgomery**. The trial court considered defendant’s young age but did not consider the corresponding characteristics of his youth. His sentence thus violated **Miller**.

Although relief following a first-stage dismissal typically involves remand for second-stage proceedings, the proper relief for this claim was to vacate defendant’s sentence and remand for resentencing.

(Defendant was represented by Assistant Defender Jeff Svehla, Chicago.)

§§45-13, 45-16(b)

People v. Nelson, 2016 IL App (4th) 140168 (No. 4-14-0168, 3/10/16)

Defendant argued for the first time on appeal from the second-stage dismissal of his post-conviction petition that he did not receive the correct pre-sentence credit against his sentence. The State did not challenge defendant’s claim that he was entitled to more credit, but argued that sentence credit is a statutory claim that cannot be raised in a post-conviction petition.

The court agreed that defendant was entitled to the additional credit, but held that it did not have authority to award defendant the credit. The Post-Conviction Hearing Act is jurisdictional in nature limiting the subject matter reviewable under the act to claims of a substantial denial of constitutional rights. 725 ILCS 5/122-1. The denial of a statutory right is not cognizable under the act.

Although the Illinois Supreme Court held that a sentence with incorrect sentence credit is void and may be attacked at any time, **People v. Roberson**, 212 Ill. 2d 430 (2004), that holding no longer correctly reflects the law after **People v. Castleberry**, 2015 IL 116916, abolished the void judgment rule.

Since the court had no jurisdiction over defendant’s statutory claim, it could not grant him the relief he requested. The court noted however that defendant could petition the trial court to correct the “simple error in arithmetic, as trial courts retain jurisdiction to correct non-substantial matters of inadvertence or mistake.”

(Defendant was represented by Assistant Defender Joel Wessol, Springfield.)

§45-13

People v. Smith, 2016 IL App (1st) 140887 (Nos. 1-14-0887 & 1-14-0937 (cons), 3/1/16)

1. The post-conviction hearing act typically contemplates the filing of only one petition. The court may normally only allow a defendant to file a successive petition if he demonstrates cause and prejudice. 725 ILCS 5/122-1. But under the void-sentence rule, a sentence which is not authorized by statute is void and may be subject to collateral attack at any time.

2. In a successive post-conviction petition, defendant argued his extended-term sentences were unauthorized by statute and hence void. The trial court denied leave to file the successive petition. On appeal, defendant argued that the trial court improperly dismissed his successive petition since his sentences were void and subject to attack at any time.

After defendant filed his opening brief, the Supreme Court decided **People v. Castleberry**, 2015 IL 116916, abolishing the void-sentence rule. Defendant argued in his reply that since **Castleberry** created a new rule, it should not apply retroactively to cases on collateral review, and thus the void-sentence rule should apply to his case, allowing him to challenge his sentence in a successive petition.

3. Under **Teague v. Lane**, 486 U.S. 288 (1989), a judicial decision that establishes a new rule applies to all criminal cases pending on direct review, but does not apply (with two exceptions inapplicable here) to cases on collateral review. A decision creates a new rule if the result was not dictated by precedent existing at the time defendant's conviction became final.

The Appellate Court held that **Castleberry** did not create a new rule. Instead it abolished an old rule and thereby reinstated the rule that existed before the void-sentence rule was established by **People v. Arna**, 168 Ill. 2d 107 (1995).

Since **Castleberry** “did not announce a new rule and cannot be applied retroactively,” defendant could properly challenge his sentences in a successive post-conviction petition. The court vacated the extended-term portion of defendant's sentences.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

STATUTES

§48-1

Mitchell v. People, 2016 IL App (1st) 141109 (Nos. 1-14-1109 & 1-15-0816, cons., 3/31/16)

The Torture Inquiry and Relief Commission Act (720 ILCS 40) established a commission to investigate claims of torture. A “claim of torture” is a defendant’s claim that he was tortured into confessing to a crime and “there is some credible evidence related to allegations of torture by Commander Jon Burge or any officer under the supervision of Jon Burge.” 720 ILCS 40/5(1).

Although Burge had been fired by the time the defendants were interrogated, the court held that their cases fell within the jurisdiction of the Act since they alleged that they were tortured by officers who had previously served under Burge’s supervision. The court found that the language of the Act was ambiguous and susceptible of two reasonable interpretations. On the one hand, the phrase “related to allegations” of torture by Burge or those he supervised could be interpreted to include claims of torture by officers formerly under his command. On the other hand, the phrase “under the supervision of” could be interpreted as only encompassing claims of torture by Burge or officers presently under his command at the time the torture took place.

When faced with an ambiguous statute, courts will give substantial weight and deference to the interpretations of the agency charged with administering the statute, even though courts are not bound by such interpretations. Here the committee issued an order concerning its jurisdiction and proposed regulations specifically finding that its jurisdiction included allegations of torture by officers who were previously supervised by Burge.

The court deferred to the committee’s clear interpretation of its jurisdiction and reversed the trial court ruling that the claims fell outside the Act’s jurisdiction. The cases were remanded for further proceedings in accordance with the Act.

WAIVER - PLAIN ERROR - HARMLESS ERROR

§56-2(a)

People v. Clark, 2016 IL 118845 (No. 118845, 3/24/16)

1. A defendant may not be convicted of an uncharged offense, unless it is a lesser-included offense of the charged offense and the trial evidence rationally supports conviction on the lesser offense and acquittal on the greater offense. Courts use the charging instrument approach in determining whether an uncharged offense is a lesser-included offense.

2. The State charged defendant with aggravated vehicular hijacking while armed with a firearm (720 ILCS 5/18-4(a)(4)) and armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2)). Following a bench trial, the court acknowledged that defendant committed the offenses while armed with a gun, but determined that the gun was used as a bludgeon “and will be treated as such.” The court thus found defendant guilty of aggravated vehicular hijacking and armed robbery without a firearm. Defendant did not object to this finding.

3. Both the aggravated vehicular hijacking and armed robbery statutes make a clear distinction between committing these offenses while being armed with either (1) a firearm or (2) a dangerous weapon other than a firearm. 720 ILCS 5/18-2(a)(1), (2); 720 ILCS 5/18-4(a)(3), (4).

The Illinois Supreme Court held that it “would have to stretch plain meaning and common understanding beyond a semblance of reason” to find that charging defendant with committing these offenses while armed with a firearm gave him notice that he was also charged with committing these offenses while armed with a dangerous weapon other than a firearm. The plain language of these statutes shows that the different offenses are mutually exclusive of each other. The offenses of aggravated vehicular hijacking and armed robbery without a firearm are not lesser-included offenses of the charged offenses.

4. Although defendant did not object to this error, the Supreme Court found that it was cognizable and remedial under the second prong of plain error. Plain error is applicable when clear or obvious error occurs and: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error; or (2) the error is so serious that it affected the fairness of defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

The court first held that the error here was clear since the two offenses as defined in the relevant statutes are mutually exclusive of each other. The court also found that the error challenged the integrity of the judicial process. Although the trial court may have attempted to afford defendant some benefit by convicting him of using a weapon other than a firearm (when all of the evidence showed that he did in fact possess a firearm), the result of the trial court’s actions was that defendant was convicted of offenses that he was not charged with and did not commit. Permitting unauthorized convictions to stand challenges the integrity of the judicial process.

In reaching this decision, the court specifically declined to limit the second prong of plain error to the six types of structural error recognized by the United States Supreme Court.

The court affirmed the lower court’s judgment reducing defendant’s convictions to vehicular hijacking and robbery and remanding the case for resentencing.

(Defendant was represented by Assistant Defender Gil Lenz, Chicago.)

§56-2(b)(3)(a)

People v. Salem, 2016 IL App (3d) 120390 (No. 3-12-0390, 3/21/16)

The State improperly impeached defendant with proof of his guilty plea because the plea had not yet resulted in a sentence and final judgment of conviction. While a guilty plea is an admission of guilt, it does not become a final judgment of conviction until the court imposes a sentence.

Although defendant did not object to the error, the improper admission of this evidence along with other prior convictions that were inadmissible because they were over 10 years old constituted second prong plain error since it “was so egregious that it eroded the integrity of the judicial process and rendered defendant’s trial fundamentally unfair.”

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

WITNESSES

§57-6(b)(1)

People v. Weinke, 2016 IL App (1st) 141196 (No. 1-14-1196, 3/1/16)

1. On the first day defendant appeared in court, the prosecutor asked the court for permission to conduct a video deposition of the victim to preserve her testimony, asserting that she had suffered critical injuries and it was unclear how long she would survive. Defendant objected to the request.

On the following day, the prosecutor filed a written motion pursuant to Supreme Court Rule 414 requesting that a video deposition be taken that afternoon due to the “substantial possibility” that the victim would be unavailable for trial. The motion contained no details or documentation, but the prosecutor stated that the victim was due for surgery a few days later and her injuries were very extensive. Defendant again objected stating that he was not prepared to cross-examine the victim. The prosecutor stated that based on her review of the medical records and conversations with the victim’s physicians, she might not survive her upcoming surgery.

The court granted the motion and scheduled the deposition that afternoon. Defendant again objected on the basis that he had no time to prepare. When the prosecutor again asserted that the victim might not survive much longer, the court stated

that it was granting the motion based on the prosecutor's representation as to the severity of the victim's condition and the chance that she might not survive.

The deposition was taken that afternoon and the victim died two months later prior to trial. At trial, the State moved to admit the deposition. Defendant objected arguing that the lack of notice deprived him of an opportunity to effectively cross-examine the victim. Defendant also submitted the victim's medical records and contended that the prosecution had provided the court with inaccurate information about her condition by exaggerating the extent of her injuries and the seriousness of her condition, and by falsely claiming that its information had come from the treating physicians.

The trial court allowed the deposition into evidence and following a bench trial convicted defendant of first degree murder. The Appellate Court held that the deposition was improperly admitted.

2. First, the court held that as a matter of law the State failed to meet its burden under Rule 414 of providing the court with evidence that the deposition was necessary because there was a substantial possibility that the witness would be unavailable at trial. Ill. S. Ct. R. 414. The State's written motion was "perfunctory, cursory, and without any supporting documentation."

Instead, the State relied on its oral assertions about the victim's injuries and medical condition. But none of these assertions constituted evidence. They were simply assertions. The court thus found that even if the assertions had been accurate, they did not satisfy the rule's requirement that at least some evidence is needed to satisfy the movant's burden. Additionally, the court found that many of the State's assertions were "false, misleading, or both." The State seriously exaggerated the victim's injuries and her medical condition, as well as the source of its information.

Allowing the deposition to be taken before defendant had an opportunity to investigate the case and develop evidence gave the defense virtually no ability to fulfill its necessary adversarial function. Under these circumstances, granting the deposition was reversible error.

3. The court also found that the admission of the deposition violated defendant's right to confront witnesses under the federal and Illinois constitutions. Preexisting testimony is admissible if the witness is unavailable at trial and defendant had an adequate opportunity to effectively cross-examine the witness. To determine whether a defendant had an adequate opportunity for cross-examination, courts examine the motive and focus of the prior cross-examination, whether the cross was unlimited, and what counsel knew when conducting the examination.

The court found that here the motive was the same and that there was no limit placed on counsel's cross. But the focus of the cross would have been different at trial because counsel was not prepared to question whether the evidence supported defendant's guilt because he had no opportunity to prepare for the hastily convened deposition.

Additionally, counsel was at a “severe informational disadvantage” due to his inability to prepare. Thus, since counsel did not have an adequate opportunity to cross-examine the witness, the use of the deposition at trial violated defendant’s right to confrontation.

Defendant’s conviction was reversed and remanded for a new trial.

§57-6(b)(4)(f)(3)

People v. Salem, 2016 IL App (3d) 120390 (No. 3-12-0390, 3/21/16)

The State improperly impeached defendant with proof of his guilty plea because the plea had not yet resulted in a sentence and final judgment of conviction. While a guilty plea is an admission of guilt, it does not become a final judgment of conviction until the court imposes a sentence.

Although defendant did not object to the error, the improper admission of this evidence along with other prior convictions that were inadmissible because they were over 10 years old constituted second prong plain error since it “was so egregious that it eroded the integrity of the judicial process and rendered defendant’s trial fundamentally unfair.”

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)